

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
CASEY'S MARKETING COMPANY)	PERMIT NO. DL83-21671
d/b/a CASEY'S GENERAL STORE)	
1211 WESTERN AVENUE)	
CLINTON, INDIANA 47842)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Permittee, Casey's Marketing Company, d/b/a Casey's General Store, 1211 Western Avenue, Clinton, Indiana 47842 ("Applicant") is the applicant for a Type 115 Alcohol and Tobacco Commission ("ATC") permit #DL83-21671. On or about March 15, 2005, Applicant filed its application, which was assigned to the Vermillion County Local Alcoholic Beverage Board ("Local Board") for hearing. The Local Board heard the application request on June 9, 2005, and on that same day, voted 4-0 to deny the application. The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge U-Jung Choe. The matter was set for hearing on November 4, 2005, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Applicant was represented by Jerimi J. Ullom, Barnes & Thornburg LLP and David M. Heger, Barnes & Thornburg LLP. There were no remonstrators of record before the Hearing Judge in this matter.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant:
1. Wanda Richardson; and
 2. Betty Gregor.
- B. The following individuals testified before the Local Board against the Applicant:

1. Julie Wineinger; and
 2. Ashley Wineinger.
- C. The following exhibits were introduced before the Local Board in favor of the Applicant:
- None.
- D. The following exhibits were introduced before the Local Board against the Applicant:
- Petition in support of Remonstrators.

III. EVIDENCE BEFORE THE ATC

- A. The following individuals testified before the ATC in favor of the Applicant in this cause:
1. Wanda Richardson.
 2. Betty Gregor.
- B. The following exhibit was introduced and admitted before the ATC in favor of the Applicant:
1. Petition in Support of Applicant.
- C. Remonstrators testifying against Applicant at ATC:
- None.
- D. The following exhibits were introduced and admitted before the ATC in support of the Remonstrator:
- None.

IV. FINDINGS OF FACT

1. The Applicant, Casey's Marketing Company, d/b/a Casey's General Store, 1211 Western Avenue, is an applicant for a Type 115 Alcohol and Tobacco Commission ("ATC") permit, #DL83-21671 (Local Board Hearing; ATC file).
2. The Applicant established by evidence at the Local Board Hearing and the Appeal

Hearing that it meets the ATC character of business test, Ind. Code § 7.1-3-1-19, and that it qualifies as a “grocery store” to hold a Type 115 alcoholic beverage permit. (ATC file, Local Board Hearing and Appeal Hearing).

3. Several holders of Type 115 alcoholic beverage permits in Vermillion County operate businesses similar in nature to that of the Applicant, are located in close proximity to the Applicant and are direct competitors of the Applicant. (ATC files and Appeal Hearing).

4. The Applicant currently holds other alcoholic beverage permits issued to stores similar, if not identical, to the Applicant’s store in Vermillion County. (Appeal Hearing).

5. The Applicant has applied for the Permit in order to compete with other outlets offering alcoholic beverages for sale in Vermillion County. (Appeal Hearing).

6. Remonstrators testified at the Local Board Hearing against the granting of the Permit on the basis that there is not a need or desire in the community for Applicant to obtain the Permit. (Local Board Hearing).

7. Remonstrators submitted a petition at the Local Board Hearing containing the signatures of 114 people who do not feel there is a need for the Applicant to obtain the Permit. (Local Board Hearing).

8. The Local Board voted 4-0 to deny the Permit.

9. The Local Board did not provide its justification for its vote on the Local Board Voting Sheet; however, comments made by several members of the Local Board indicated that the basis of the Local Board’s recommendation was insufficient need in the community for the Applicant to obtain the Permit. (Local Board Hearing).

V. CONCLUSIONS OF LAW

1. The Applicant is an applicant for a Type 115 Alcoholic Beverage Permit No.

DL83-21671.

2. The Commission has discretion to issue or deny an application for a retail liquor permit. Ind. Code § 7.1-3-19-1; *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 269 Ind. 48, 379 N.E.2d 140 (1978). The Commission may investigate an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the public interest shall be served best." Ind. Code § 7.1-3-19-10; *Harmon*, 269 Ind. 48, 379 N.E.2d 140.

3. The Commission may consider several factors in determining the desirability of a potential geographical location for a new permit. 905 IAC 1-27-4 provides, in pertinent part:

The commission upon application for a new...permit, shall also investigate the desirability of the permit in regard to the potential geographical location of said permit. In making this determination, the commission may consider, but is not limited to the following factors:

- (a) The need for such services at the location of the permit.
- (b) The desire of the neighborhood or the community to receive such services.
- (c) Impact of such services on other business in the neighborhood or community.
- (d) Impact of such services on the neighborhood or community.

4. The Commission must deny an application for a permit when a majority of the members of a local board recommend that the permit not be granted unless the commission determines, after *de novo* review, that to follow the recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11(a); *Taylor Drug Stores, Inc.*

v. Indiana Alcoholic Beverage Comm'n, 497 N.E.2d 932 (Ind. Ct. App. 1986).

5. The Applicant contends the decision of the Local Board to deny the Permit was arbitrary and capricious and was not supported by substantial evidence. (Brief of Applicant).

6. An administrative agency action is arbitrary and capricious “only where there is no reasonable basis for the action.” *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996). An arbitrary and capricious decision is “patently unreasonable,” and “lacks any basis which might lead a reasonable person to the same conclusion.” *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998). The burden of proving that the administrative action in question was arbitrary or capricious falls on the party attempting to reverse the decision. *Forrest v. Sch. City of Hobart*, 498 N.E.2d 14, 17 (Ind. Ct. App. 1986).

7. The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences there from are of such a substantial character and probative value as to support the administrative determination. *Indiana Alcoholic Beverage Comm'n v. Edwards*, 659 N.E.2d 631 (Ind. Ct. App. 1995).

8. The decision of the Local Board to deny the Permit was based upon substantial evidence and was neither arbitrary nor capricious. The Local Board heard testimony and reviewed petitions submitted by the Applicant and Remonstrators regarding the community’s need or desire for the grant of a permit to the Applicant. Comments made by members of the Local Board immediately following their vote indicated they felt there was not a need for alcohol to be served at the proposed permit premises. Under 905 IAC 1-27-4, the Local Board must consider community need and desire in reaching their decision. The Local Board considered the evidence before it and based its decision on that evidence. (Local Board Hearing).

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the appeal of

Applicant, Casey's Marketing Company for a type 115 Alcohol and Tobacco Commission permit is denied, the recommendation of the Local Board in this matter is affirmed, and the Permit DL83 -21671 applied for herein is DENIED.

DATED: _____

U-Jung Choe, Hearing Judge